No. 288.

IN THE

# UNITED STATES

# CIRCUIT COURT OF APPEALS

FOR THE

## NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*



Appeal from the Circuit Court of the United States, for the District of Washington, Northern Division.

## Appellees' Notice and Motion to Dismiss.

JAMES HAMILTON LEWIS,
*Solicitor for Appellees.*

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
*Of Counsel.*

ROWMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE.

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*To the Farmers' Loan & Trust Company, appellant, and to Messrs. Struve, Allen, Hughes & McMicken, your attorneys of record:*

You and each of you will please take notice that the appellees will call up for hearing the annexed motion to dismiss your appeal on the grounds therein stated, on the 11th day of June, 1896, in the court room of the Circuit Court of Appeals of the United States for the Ninth Circuit, in San Francisco, California, at the hour of 10 o'clock, A. M., or as soon thereafter as counsel can be heard.

JAMES HAMILTON LEWIS,
*Solicitor for Appellees.*

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
*Of Counsel.*

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees*. } No. 288.

Come now the appellees herein and respectfully move the court that the appeal herein be dismissed, and assign as grounds of such dismissal the following:

1st. That the record on appeal in this cause has not been properly certified to this court and there is no evidence before this court that a complete record on appeal has been brought up, or one comprehending all records necessary to the hearing of the appeal.

2nd. That the order from which appellant has appealed, to-wit: the order of December 18th, 1895, is not appealable because not a final order.

3rd. For the reason that it appears by the record in this court that two other parties, to-wit: Andrew F. Burleigh, Receiver, and the Northern Pacific Railroad Company, both of whom were defendants below and the former of whom was included in the order appealed

from, have not been joined in this appeal or severed from it by summons and severance, or have had any notice whatever by citation, or otherwise, of the appeal herein.

4th. That other defendants, parties to the record and interested in the cause, have never been served or notified of the appeal or made parties thereto.

I.

Examining the foregoing grounds in turn, we find the clerk's certificate in this case to be (Transcript, p. 48), "that the foregoing * * * pages are a full, true and correct transcript of the record on appeal." We do not believe that so meagre a certificate has ever before been accepted. It does not at all comply with the requirements of Rule 14 of this court (Subdivision 3). The word *complete* has been necessary to a clerk's certificate on appeal for the greater part of a century under the appellate provisions of the United States Courts.

*Keene vs. Whitaker, 13 Peters, 459.*
*Redfield vs. Parks, 130 U. S., 623.*

If to the words *full*, *true* and *correct* the clerk had added "of all the papers on file," or "of all proceedings in said cause," there might be something to stand upon.

What the clerk has to send up by statute, and the rule adds more, is defined in Section 750 of the Revised Statutes, where his duties as to making up final record for the purposes of the lower court are defined. In section 698, his duties as to this final record and other records when the cause is appealed are laid down, and in the latter section he is directed to send up along with

other things such papers "as may be necessary on the hearing of the appeal." The clerk in this instance has not certified either that he has sent up a *complete* record of anything or that it is a copy *of all* the proceedings in the cause as required by Rule 14, or that it comprehends everything *necessary to the hearing of the appeal*, and we believe that even if the words used by the clerk in this instance were so far improved that the word *complete* should be substituted for the less comprehensive word *correct*, it would not be sufficient, and that in addition to the words "full, true and complete," a certificate should contain "of all the papers, etc.," or "of all proceedings," or "of all the record necessary to the hearing of the appeal," and we do not think a case can be cited in which a certificate has been accepted without these words.

II.

The original order in this case was made on the 16th day of August, 1894 (Transcript, p. 5). This order required the railroad company's receiver to make payment of the claims in cash or certificates within thirty days. Subsequently the complainant's solicitors asked leave to show cause why this order should be set aside, and this leave was granted them. The matter then hung on until the 18th day of December, 1895, when their motion to vacate the original order of August 16, 1894, was denied (Transcript, p. 12).

Under this state of facts we believe the final order in the case to have been the original one. The motion to vacate that order would indeed suspend the running of the appeal period, and until it was disposed of the ap-

peal time would not count against complainants or others, but when it was disposed, of the thing to complain of and appeal from was the order originally entered, whereas, in this case the appeal is from the order of December, 1895 (Transcript, pp. 31 and 46).

An appeal will not lie from a refusal to open a decree.

*McMicken vs. Perin, 8 Howard, 507.*
*Steines vs. Franklin Co., 14 Wallace, 15.*
*Wyle vs. Coxe, 14 Howard, 1.*
*Brackett vs. Brackett, 2 Howard, 238.*
*Andrews vs. Thum, 72 Fed., 290.*
*Bondholders, etc. vs. Toledo, etc., R. R., 62 Fed., 166.*

It may possibly be contended that because the court made a slight modification of the original order when it denied the motion to vacate (Transcript, pp. 12 and 13) that it in effect made a new order which is the final one here. We do not think, however, that this can possibly be contended. The changes, it will be noticed, simply are that instead of paying interest on the petitioner's claim, as provided for in the original order, the receiver shall not pay interest, and that instead of depositing receiver's certificates, as the original order provided, he shall pay the petitioners in cash. The former of these modifications is so manifestly in the interest of the parties now appealing that it could hardly be said that they had anything in that that they could complain of or that it constituted a new order to their prejudice. As to the latter modification, that changing by certificates to payment in cash, it cannot be clear in what way complainants are prejudiced by that either, and indeed, regarding the receiver as an officer of the court, these

modifications are nothing more than supplementary orders, which the court, it seems to us, would have had the power to make *ex parte*. The original order of August 16, 1894, disposed of the whole question as to the liability in point of law and the mere manner in which the receiver should make the payment seems so unimportant a part of the order that we do not think the supplementary instructions of the judge in this respect could constitute a new judgment, order or decree.

It is apparent from the record that the order which alone could aggrieve the appellant, and which was the order ordering the payment to these appellees of the money due upon their judgments, was made and entered August 16, 1894. The attempted appeal in this case is taken January 20, 1896, more than one year and five months expiring; in other words, taken a year after the time had expired for the allowance of the appeal.

Clearly there is no law for this and the appeal should be dismissed.

It will not suffice to say that appellant was not a party to the petition; it was not called on in anywise to be. It only related to the railroad, to the receiver. It concerned but the receiver. It was an order made by the court in the management of the property in the hands of the court through the receiver. If any outside person is aggrieved he could come in and make such known by proper proceeding. That the appellant subsequently came in by a motion seeking to have the order set aside did not affect its right to come in at the same time it made such motion and avail itself of the privilege of appealing, and obtain the permission to

intervene for the purpose of appealing, and if it had any rights or concern in the matter, its right would have been to appeal within the proper time if the receiver did not so desire. The appellant did not come in the cause on the 16th day of September, 1894, a month later than the date of the order, asking for time in order to show that the order was not properly made, and obtained until October 3rd, 1894, to make an order to vacate, and on November 16, 1894, made the order to vacate.

(See Record, pages 5, 6, 7, 8 and 10.)

True in all these intermittent periods had the appellant any rights its rights would have been to appeal from the order, as it could but stand in the place of the receiver. It has not done so until eighteen months after the order which it complained of. Surely this will not do, for it is without the meaning of the law; it is contrary to the limitations of the statute.

The appeal cannot be sustained and must be dismissed for the reasons:

1st. That it is not taken in time, to-wit, within six months from the final order or decision in the cause.

2d. Nor within one year from the date of the decision giving a right or asserting a privilege to any party in the cause.

From the points heretofore made it is clear that the decision refusing to vacate the order, which decision was made on the 18th of December, 1895, is not the final order in the cause, and is not the order which gave the plaintiffs their rights as against the receiver or the appellant, and therefore is not the proper one to have ap-

pealed from, and is not therefore an appealable order or decision. And for these reasons it is apparent that the appeal should be dismissed.

## III.

And now upon this point, No. 3, we insist that this appeal, irrespective of all other questions, must at once be dismissed, and an order affirming the decision of the lower court must follow as of course.

This appeal should be dismissed because it is heedlessly taken, it is carelessly taken—taken without regard to the rights of the appellees or of the persons interested in the cause or of the parties to the record. That is to say,

(1) Parties interested in the judgment are not notified of the appeal;

(2) Parties to the record are not made parties to the appeal;

(3) Parties against whom the judgment is made are not made parties to the appeal.

(4) Parties who have a right to be heard as to the affirmance or reversal of the decision are not made parties to the record.

(5) No citation is served upon all the parties to the record.

(6) No citation is served or notice given to parties who are interested in the decision, and against whom the decision is made to operate.

(7) There has been no severance as to the appellant.

(8) There has been no refusal in behalf of the other parties to the record to appeal.

(9) There has been no order allowing the appellant to appeal alone, for any cause shown on the record or at all.

(10) Seven parties appear as necessary parties in order for the adjudication and the order to be executed, only three of them, to-wit: the beneficiaries under the judgments, are at all even notified of the appeal. The remaining four are at liberty the one after the other to maintain separate appeals against these appellees if the present course adopted by the appellant can within any form of reason or precedent be allowed.

It is to be observed on the record that the order complained of is made in the title of a cause as follows: The Farmers' Loan and Trust Company vs. The Northern Pacific Railroad Company *et al.*

(See Transcript, pages 5 and 6.)

That the motion of appellant for order extending the time for further objections on its part was in the same cause, to-wit: The Farmers' Loan and Trust Company vs. The Northern Pacific Railroad Company *et al.*

(Pages 6 and 7 of Transcript.)

Also the order extending the time at the appellant's instance is in the cause of The Farmer's Loan and Trust Company vs. The Northern Pacific Railroad Company *et al.*

(Pages 9 and 10 of Transcript.)

Also the order calling the same up was in the same cause. And it will be further observed that the order

denying the motion to vacate *made on the 18th day of December, 1895*, is likewise in the cause of the Farmers' Loan and Trust Company vs. The Northern Pacific Railroad Company *and others*.

It is now apparent to the court that the *et als.*, to wit, the others, were some other defendants in the cause who were parties to all the motions and all the proceedings, parties to the order granting the receiver's certificates, and parties to the order refusing to vacate the same; yet,

They are not named;

They are not served;

They are not even present before the court that the court may see who they are, the nature of their interest or what attitude they occupy to either the claimants or the appellees.

This appeal cannot be sustained as long as such defendants are upon the record in the name of "*and others*," without their personnel being disclosed, their attitude disclosed, their relation shown, and an order and notice served upon them duly in the cause bringing them before the court.

This has so freely been asserted by the highest courts of the country, and so frequently, that no more than a reference to the doctrine is needed at this time, which we also assume to offer the court, and the law determining the motion on this one division of this ground alone is as follows:

The Supreme Court, by Chief Justice Marshall, first announced the principle which has governed the court to this day.

"The present writ of error is brought by Mary Deneale 'and others,' as plaintiffs; but who the others are cannot be known by the court, for their names are not given in the writ of error, as they ought to be. Mary Deneale cannot *alone* maintain a writ of error on this judgment; but *all the parties must be joined to give a proper judgment on the case.* The present writ of error must therefore be dismissed for irregularity."

*Deneale vs. Stumpf Executors, 8 Peters, 526.*

The principle of this case was thereafter affirmed by the court, Chief Justice Taney delivering the opinion,

*Heirs of Wilson vs. Ins. Co., 12 Peters, 140, 141.*

"The counsel for the defendant in error has moved to dismiss this case; 1st, because no persons are named as plaintiffs in the writ of error, but they are described generally in the writ as 'The heirs of Nicholas Wilson'; 2d, If this general description is sufficient, yet it appears by petition for the writ, which is referred to in the appeal bond, that the widow did not join in the application for the writ of error; and as the judgment against the defendants was a joint one, they must all join in a writ of error, unless there is a summons and severance."

"We think the writ of error must be dismissed on both grounds, and that the points raised have already been decided by the court. In the case of Deneale vs. Stumpf, 8 Peters, 526, the writ of error issued in the name of 'Mary Deneale, the executrix of George Deneale and others.' It was dismissed on the motion of the defendants in error, and the court said, 'the present writ of error is brought by Mary Deneale *and others* as

plaintiffs, but who the others are cannot be known by the court, for their names are not given in the writ of error as they ought to be. Mary Deneale cannot *alone maintain a writ of error on this judgment; but all the parties must be joined and their names set forth, in order that the court may proceed to give a proper judgment in the case.*' In the case now before the court the name of no one of the parties is set forth in the writ of error; and, according to the rule laid down in the case referred to, this writ of error cannot be maintained."

"In both of the cases referred to it appears that the motions to dismiss were not made at the first term, or at the time of appearance in the court; but each of the cases had been pending here two years before the motion was made. The rule of this court therefore is, that where there is a substantial defect in the appeal, or writ of error, the objection may be taken at any time before judgment, on the ground that the case is not legally before us, and that we have no jurisdiction to try it. It follows, that the writ of error in the case under consideration must be dismissed."

*Wilson vs. Ins. Co., 12 Peters, 141.*

The Supreme Court has decided that this principle applicable to writ or error, is also applicable to appeals in equity.

Chief Justice Marshall, for the court saying:

"A motion is now made to dismiss this appeal, because the decree being joint, all the parties ought to join in the appeal.

"Upon principle it would seem reasonable that the whole cause ought to be brought before the court, and

that all the parties who are united in interest ought to unite in the appeal. We have found no precedent, in chancery proceedings, for the government in this case. But in the case of Williams vs. The Bank of the United States, 11 Wheat., 414, which was a writ of error sued out by one defendant to a joint judgment against three, the writ was dismissed, the court being of the opinion that it had issued irregularly, and that all the defendants ought to have joined in it.

"By the Judicial Act of 1789, decrees in chancery pronounced in the Circuit Court could be brought before this court only by writ of error. The appeal was given by the act of 1803. The act declares, 'that such appeal shall be subject to the rules, regulations and restrictions as are prescribed by law in cases of writs of error.

"Previous to the passage of this act, the decree under consideration could have been brought into this court only by writ of error, in which all the defendants must have joined. The language of the act which gives the appeal appears to us to require that it shall be prosecuted by the same parties who would have been necessary in the writ of error. We think also that the same principle would have been applicable from the general usage of chancery, to make one final decree binding on all parties united in interest.

"The appeal must be dismissed, having been brought up irregularly."

*Owings vs. Kincannon, 7 Peters, 402.*

The settled practice of the court is stated and again announced by Judge Miller (speaking for the court):

"But many cases have been dismissed by this court,

because the writ of error described either plaintiff or defendant as 'A. B. and others,' or 'A. B. & Co.,' or other partnership style, or as 'Heirs to C. D.,' and such other descriptions as did not give the names of all other persons who were supposed to be brought before the court by the writ. Of late years these cases have simply been dismissed upon the authority of previously adjudged cases, without giving other reasons for so doing."

*Mussina vs Cavazos, 6 Wall., 361.*

And reviewing the cases and their *rationale*, he continues:

"Early in the history of the court it was ruled that unless all the parties in the court below, to a joint judgment or decree, *were made parties in this court* by the writ of error or by the appeal, the cause would not be entertained. This was first held as to judgment at law, in the case of Williams vs. Bank of United States, and to decrees in chancery, in the case of Owings vs. Kincannon. At the next term of the court after this last decision, we have the first of the class of cases to which we have alluded. It is the case of Deneale vs. Stumpf's Executors. The writ described the plaintiffs in error as 'Mary Deneale and others,' and the reasons given for dismissing it are two: 1st, that all the parties against whom the judgment was rendered *must join* in the writ, which is not done by naming some of them merely as 'others;' and, 2nd, that *the names should be set forth that this court might render the proper judgment in the case.* The opinions in the three cases last cited were delivered by C. J. Marshall."

"The next of this class of cases is that of Wilson's Heirs vs. The Insurance Company, in which the court holds, that a writ in the name of the the 'Heirs of Nicholas Wilson' must be dismissed. The court simply says that this is done on the authority of Owings vs. Kincannon, and of Deneale vs. Stumpf's Executors. The subsequent cases are all based on the authority of these decisions. In all of them it appeared by the writ that there were parties to the judgment below not personally named in the writ."

*Mussina vs. Cavazos, 6 Wall., 362.*

See also

*Miller vs. McKenzie, 10 Wall., 582.*
*Smith vs. Clark, 12 How., 327.*
*Smyth vs. Strader, 12 How., 21.*
*Protector, 12 Wall., 700.*

In this last case the words "and others" were held of themselves to disqualify the appeal; and that the persons for whom these words stood should be named and brought before the court and their interest disclosed, and that the failure so to do was of itself enough to give the court no jurisdiction of the appeal, and that such a point could be raised at any time previous to the final judgment in the appellate court and would be availing.

Now, as to the second subdivision of this motion, we must respectfully insist that there can be no answer nor avoidance of the conclusion that for the reasons here and now stated this appeal must be dismissed.

Upon a reference to the record it is apparent that the Northern Pacific Railroad Company was the defendant

against which the order was made; that H. C. Rouse, H. C. Payne and T. F. Oakes were receivers of the said road against whom the order was made to operate.

(Transcript, pages 2, 16.)

And also that A. F. Burleigh was the receiver subsequently representing all the other receivers and being the direct party against whom the order was enforceable, and he is a party to the judgment and to all orders made in the cause, and against whom an appeal was sought by the appellant.

(See Transcript, page 31.)

Errors were assigned against said Burleigh and the said receivers.

(Transcript, page 33.)

The supersedeas bonds were made to run in the cause against the Northern Pacific Railroad Company and Andrew F. Burleigh, receiver.

(Transcript, pages 37, 39, 43.)

And the title of the citation and of the clerk's certificate was against the Northern Pacific Railroad Company and Andrew F. Burleigh.

(Transcript, pages 46 and 48.)

And most convincing appears that the opinions of the court upon which errors are assigned are rendered in the cause of the Northern Pacific Railroad Company and Andrew F. Burleigh as defendants, and the certificate to the opinion is in the same cause with the same defendants.

Yet and notwithstanding,

(*a*) No citation is served on the Northern Pacific Railroad Company.

(*b*) No citation is served on Andrew F. Burleigh the receiver.

(*c*) No notice given to the Northern Pacific Railroad Company.

(*d*) No notice given to the receiver.

(*e*) No request to the Northern Pacific Railroad Company to appeal.

(*f*) No request to the receiver to appeal.

(*g*) No refusal by the Northern Pacific Railroad Company.

(*h*) No refusal by the receiver.

*Again, there is no severance, or order of severance allowing complainant to appeal alone, or exempting the complainant in anywise from bringing before the court by due service all persons interested directly in the order appealed from.*

In so far as this court is concerned, it may be, as appears from the record, that neither the Northern Pacific Railroad Company nor Andrew F. Burleigh the receiver has up to this moment the slightest knowledge that a case in which they were defendants and against whom the direct decision was made has been appealed.

Surely this course cannot be tolerated.

Shall these appellees, when this court has determined the present appeal, be subjected to another appeal by the receiver who shall say that he represents the creditors, has a right to be heard, and insists that no preference should be allowed to any person, or that it should be allowed? And then

When this is determined shall the Northern Pacific Railroad Company then be heard as to its appeal that

it has a right to have these claims paid in a certain way, and not to be charged against its general indebtedness? That it has a right to insist that it has an equity discretion, and a right that these be charged against the mortgagee taking possession of the property, as is true of one of the doctrines; and when its appeal is disposed of shall these appellees be again subjected to another appeal by the Seattle, Lake Shore & Eastern Railway Company, against which the judgment of Raskey was duly entered, it being one of the owners of part of the line used at the time Raskey was injured, and which company appears to be interested in the litigation, and a part originally of the order,

(See Transcript, page 1.)

and which appears and contends in the case by its counsel?

(See Transcript, page 2.)

Or, presenting before the court the situation of but the Northern Pacific Railroad Company and Andrew F. Burleigh, can there be any doubt but what these two defendants should have been brought before the court in this appeal, and their rights or their contentions, in so far as these appellees are concerned, be at once disposed of, that these appellees be not further subjected to the uncertainty as to whether their rights are adjudicated finally, or whether they are to be harassed with repeated appeals by these other two necessary defendants in the cause, and who are parties directly to the decree, and against whom the joint order is made? We most respectfully insist that the true doctrine of the law upon this question which justifies us in insisting

that this appeal be dismissed can be stated as the uniform practice, and as is set forth in the following cases as stated by them. We refer

First: "This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and it appearing to the court here, upon the motion of Messrs. Hall & Robinson, of counsel for the appellees, that the decree of the said District Court in this cause is a joint decree against several co-defendants, and that Patrick C. Shannon alone has appealed therefrom, *without any summons and severance from the rest of his co-defendants*, it is the opinion of this court that the case is improperly brought here. On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the appeal be, and the same is, hereby dismissed with costs."

*Shannon vs. Cavazos, 131 U. S., LXXI (Appendix).*

In 1892 the Supreme Court took special care to reexamine the practice and state the rule and reason of it, and said:

"Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal. Owings vs. Kincannon, 7 Pet., 399; Musina vs. Cavazos, 6 Wall., 355."

*Hardee vs. Wilson, 146 U. S., 180.*

And at page 181, of Hardee vs. Wilson, the Supreme Court says:

"In the case of Masterson vs. Herndon, 10 Wall., 416, it was held that 'It is the *established doctrine* of this court that in cases at law, where judgment is joint,

all parties against whom it is rendered must join in the writ of error; and in *chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed.* There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. *That the appellate tribunal shall not be required to decide a second or third time the same question on the same record.*' In the case of Wilson vs. Bank of United States, 11 Wheat., 414, the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of Todd vs. Daniel, 16 Pet., 521, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books, allowed generally when more than one person was interested jointly in the cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment was to bar the party who refused to proceed from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of

the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle it is no doubt as applicable where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case *seems to have been conscious that something of the kind was necessary*, for it is alleged in his petition to the Circuit Court for an appeal that Maverick (the co-defendant), refused to prosecute the appeal with him. We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record *that Maverick had been notified in writing to appear, and that he had failed to appear*, or, if appearing had refused to join. But the mere allegation of his refusal in the petition of the appellant does not prove this. *We think there should be a written notice and due severance, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest.* Such a proceeding would remove the objections made in permitting one to appeal without joining the other, that is, would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which the court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from, which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possi-

ble to adhere to it without hazarding the substantial rights of the parties interested."

In the case of Downing vs. McCartney, reported in the Appendix to 131 U. S., at page 98, where the decree below was joint against three complainants, and only one appealed, and there was nothing in the record showing that the other complainants had notice of this appeal, or that they refused to join in it, the appeal was therefore dismissed. Mason vs. United States, 136 U. S., 581, was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and a part of the sureties appealed and defended. The suit was abated as to two of the sureties who had died, and the other sureties made default, and judgment of default was entered against them. On the trial a verdict was rendered for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties who appeared sued out a writ of error to this judgment, without joining the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as plaintiffs in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error dismissed. In Ferbelman vs. Packard, 108 U. S., 14, a writ of error was sued out by one of two or more joint defendants, without a summons and severance, or equivalent proceedings, and was therefore dismissed.

The state of facts shown by the record brings the present case within the scope of the cases above cited, and it follows that the appeal must be dismissed.

*Hardee vs. Wilson, 146 U. S., 181-183.*

The court had again, in 1893, occasion to enforce the rule in the two following cases:

"It is quite clear that Inglehart's heirs could not appeal alone, without joining the other defendants as appellants, or showing a valid excuse for not joining them.

"This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so, and this must be evident upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter. Owings vs. Kincannon, 7 Pet., 399; Todd vs. Daniel, 16 Pet., 521, 523; Masterson vs. Herndon, 10 Wall., 416; Hardee vs. Wilson, 146 U. S., 179.

"Appeal dismissed."

*Inglehart vs. Stansbury, 151 U. S., 72, 73.*

A case which seems parallel upon all its phases and conditions, and its procedure and its record to the case at bar, and in which the conclusion is reached which we insists is the inevitable one here, is

*David vs. Mercantile Trust Co., 152 U. S., 695.*

The opinion is by Mr. Justice Brewer, and the facts are stated in the opinion. We copiously quote from it as follows:

"As a preliminary matter, the standing of the appellants in this court is challenged. In the court below

he was not a party to the record, either plaintiff or defendant; was neither substituted for either; filed no bill, cross-bill or answer; but was simply permitted to intervene with liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder. Assuming, under the authority of Williams vs. Morgan, 111 U. S., 684, 689, 4 Sup. Ct., 638, that this gave him a right of appeal from any decision of the circuit court affecting his interests, it did not change the ordinary rules respecting appeals, one of which is that all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal. The rule and the reason therefor are fully stated in Masterson vs. Herndon, 10 Wall., 416, and restated in Hardee vs. Wilson, 146 U. S., 179, 181, 13 Sup. Ct., 39, and need not, therefore, be again repeated. See also Inglehart vs. Stansbury, 151 U. S., 68; 14 Sup. Ct., 237. * * * Again, not only is the purchaser interested, but also the mortgagor. He may be satisfied with the sale which was made—he may believe that at no other sale would it be possible to realize so much in satisfaction of his indebtedness. At any rate, the seting aside of the sale, and the ordering of another, may affect, prejudicially or beneficially, his interests, and because of that he has a right to be heard upon the question of setting it aside. Now, the only party respondent to this appeal is the trustee. It is the only party named as obligee in the cost bond. The citation, in terms, runs to it, only; and there is no pretense that the mortgagor of the other defendants, or the purchasers at the sale, have ever been brought into this court to re-

spond to this appeal. Manifestly, it would be the grossest injustice to attempt to determine the question of the validity of this sale in the absence of these so vitally interested parties.

Neither does the appeal from the decree stand in any better condition. In a decree for the foreclosure of a mortgage, the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted to disturb such a decree, unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside, notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case, to determine that his interests would or would not be promoted by the setting aside of the decree. It is enough that in the matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense. *Ordinarily, it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor was a party to the record, the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us.* The trustee is the only obligee named in the appeal bond, and while

the citation on its face runs to all the parties to the record, it was not served on the mortgagor, the Kanawa & Ohio Railway Company; and that company has never been brought into this court and never entered an appearance here. This is fatal to the appeal. * * * So that neither in fact nor in law was he representing the corporation mortgagor in this litigation; and as that mortgagor was interested in and affected by the decree of foreclosure and sale, it should have been made a party to this appeal, and brought into this court, and because of the failure so to do the appeal cannot be maintained. For the reasons above given both appeals are dismissed."

Later the question came before the court again in

*Sipperley vs. Smith, 155 U. S., 86-9,*

and the court referring to its previous rulings disposes of the question in the *syllabus*, as appears in the 15th Supreme Court Reporter, page 15, as follows:

"An appeal from a judgment affirming a decree against defendants and intervenors was taken by certain of the intervenors. No application for summons and severance as to an intervenor not appealing, or any equivalent therefor, nor any order permitting severance, appeared in the record; and no application was made for the issue of citation to defendants or leave to perfect the appeal as to them, and neither they nor such intervenors appeared. Held, that the appeal should be dismissed. Masterson vs. Herndon, 10 Wall., 416; Hardee vs. Wilson, 146 U. S., 179, 13 Sup. Ct., 39; Inglehart vs. Stansbury, 151 U. S., 68, 14 Sup. Ct., 237; and

Davis vs. Trust Co., 152 U. S., 590, 14 Sup. Ct., 693, followed."

And following this decision in

*Beardsley vs. Arkansas Ry Co., 15 Supreme Court Reporter, 786,*

the last expression of the court is found, in which the opinion of the court by the Chief Justice is as follows:

"This appeal was perfected as to the Arkansas & Louisiana Railway Company only by the giving of bond as required by statute (Rev. St., Secs. 1000, 1012); and while the omission of the bond does not necessarily avoid an appeal, if otherwise properly taken, and in proper cases this court may permit the bond to be supplied, no application for such relief has been made in this case, nor could it properly be accorded after the lapse of nearly four years since the decree. The appeal might, therefore, well be dismissed, because ineffectual as to the complainant, Paul F. Beardsley.

"But this must be the result on another ground. To the decree Paul F. Beardsley was party complainant, and John D. Beardsley, the St. Louis, Iron Mountain & Southern Railway Company, Jay Gould, and the Arkansas & Louisiana Railway Company were parties defendant.

"It is settled for reasons too obvious to need repetition, that in equity cases all parties against whom a joint decree is rendered must join in an appeal, if any be taken; but this appeal was taken by John D. Beardsley alone, and there is nothing in the record to show that his co-defendants were applied to and refused to ap-

peal, nor was any order entered by the court, on notice, granting a separate appeal to John D. Beardsley in respect of his own interest. The appeal cannot be sustained. Hardee vs. Wilson, 146 U. S., 179; 13 Sup. Ct., 39; Davis vs. Trust Co., 152 U. S., 590; 14 Sup. Ct., 693. Appeal dismissed."

For the reasons herein stated we respectfully submit that this appeal must be dismissed, and move the court that an order so dismissing the appeal be at once made, for the reasons herein stated.

Most respectfully submitted,

JAMES HAMILTON LEWIS,
*Solicitor for the Appellees.*

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
*Of Counsel.*

# ADDENDA.

## AMENDMENT ATTEMPTED TO SUPPLY RECORD.

It has come to our attention while this brief was in course of print that the appellant, assuming to remedy in part what is the apparent flagrant fatality in the case, as shown by the transcript, has obtained from one of the defendants, Andrew F. Burleigh, through some one reprenting him, some written consent that the appeal be had as it is. The nature of this we cannot ascertain, because it is not in the transcript; but we have to say—

It should not be considered nor regarded for any purpose.

It is five months after the taking of the appeal.

(Transcript, page 31.)

It is five months after the date of the citation issued in the appeal.

(See Transcript, page 46.)

It is four months after the appellees have appeared in the cause, and the same has been on file and in the Circuit Court of Appeals.

Such is not within the transcript and protected with the certificate of the clerk, and as a part of the complete record; therefore, such could not be heeded for any purpose.

And even if all these objections were not well taken,

such could not be heeded for *the court is without jurisdiction of the appeal and was at the time of such attempt at amendment or supplying the record.*

For want of proper service of the appeal and proper severance, and for want of the adjudicated judgment of the lower court adjudicating such severance, this court was without jurisdiction. No amendment at this time of any form or shape, even of all the parties, could aid the cause. We respectfully submit that the law tersely stated upon such positions is that which has been affirmed as such doctrines by the Supreme Court of the United States:

(*a*) Any summons or judgment of severance must be had in the circuit court from which the appeal is taken.

*Todd vs. Daniel, 41 U. S. (16 Peters), 521.*

(*b*) *Any severance, therefore, must be had before the return day of the citation, and the writ of error.*

*Bacon Abr., 268.*
*Blunt vs. Snedston, Cro. Jac., 117.*

(*c*) The defects of parties plaintiff or defendant in error cannot be cured by an amendment.

*Thompson vs. Crocker, 1 Salk., 49.*
*Walter vs. Stokoe, 1 Ld. Raym., 71.*
*The Protector, 11 Wall., 82.*

Whatever privilege of amendment section 1005 of the Revised Statutes of the United States would permit, it has never been held to permit anything more than the amendment of form.

Here the defect is that all the defendants do not join

in the appeal, nor are they served, nor all of them cited, nor does there appear to be any severance. To ground an amendment here would be in violation of section 1005 of the Revised Statutes.

It has therefore been expressly held by this Court that the omission or defect of the parties plaintiff or defendant in error is not and cannot be amended nor supplied after the time of the citation and after the cause has been appealed, as such must have existed and the severance must have been adjudicated previous to the issuance of the citation, in order that it may be ascertained who are to be cited.

*Estis vs. Trabue, 128 U. S., 225.*
*Ex parte Sawyer, 21 Wall., 235.*

(*d*) Therefore, it is held that where there is this substantial defect in the record which cannot be amended in this Court, *this Court has no jurisdiction.*

*Wilson vs. Life Insurance Co, 12 Peters, 140.*

It will then of its own motion dismiss the case without awaiting the action of any party, and will do this at any time before judgment.

*Hilton vs. Dickinson, 108 U. S., 165.*

For the court again asserts that *all the parties against whom a judgment is entered must join in a writ of error, or there must be a proper summons and severance.*

*Williams vs. Bank of U. S., 24 U. S.; 11 Wheat., 414.*
*Owings vs. Kincannon, 32 U. S.; 7 Pet., 399.*
*Wilson vs. Life & Fire Ins. Co., 37 U. S.; 12 Pet., 140.*

*Todd vs. Daniel, 41 U. S.; 16 Pet., 521.*
*Smith vs. Strader, 12 How., 327.*
*Davenport vs. Fletcher, 16 How., 142.*
*Mussina vs. Cavazos, 20 How., 280.*
*Clifton vs. Sheldon, 23 How., 481.*
*Masterson vs. Herndon, 10 Wall., 416.*
*Hampton vs. Rouse, 13 Wall., 187.*
*Simpson vs. Greeley, 20 Wall., 152.*
*Fiebelman vs. Packard, 108 U. S., 14.*

These views prohibiting any attempt at modifying or changing the record by addition thereto, or otherwise, after the time for the obtaining of jurisdiction has passed, and after the time the citation calls for the appellees to appear, found a full expression by the Supreme Court of the United States in adopting the views heretofore reached in the case of

*Hardee vs. Wilson, 146 U. S., 183-5.*

where it is held:

"The plaintiff in error moves to amend the writ by adding the immediate parties as complainants, or for a severance, and it is held that the motion must be denied, and the writ of error be dismissed." Following

*Mason vs. U. S., 136 U. S., 581.*

But to conclude on this branch, should the Court be inclined to think all these views not well taken, it still could not allow such an amendment, because the statute of limitations of such an appeal has run.

*See Brief under the second point, and Transcript heretofore cited.*
*Estis vs. Trabue, 128 U. S., 225.*
*Wilson vs. Insurance Co., 12 Peters, 140.*

But should all the views here urged be held against the appellees, still we invite the court's attention to the fact that with the amendment allowed after this expiration of time with Andrew F. Burleigh as a party brought into the cause, still you have the apparent omission and the unaccounted for absence of

1. The Northern Pacific Railroad Company.
2. The *et als.* heretofore referred to.
3. The Seattle, Lake Shore & Eastern Railway Company.

It is evident to the court that the second mortgage bondholders by their trustee, who are in the cause seeking the foreclosure, are persons represented by the *et als.* They have a right to insist that this decree be affirmed or that it be reversed, and they should be heard and determined now, once and for all time. We insist that no amendment or modification could possibly be had without a great injustice to appellees; for if the amendment is to one now, why not in a month from now to another, and in another month to a second, and in another month possibly to a third?

We respectfully urge that this attempted modification be denied, the offer of amendment in any form be refused, that any attempt to add to the transcript as certified by the clerk be held to be without authority and not under the proper exemplification.

Again we submit these suggestions with respect,

JAMES HAMILTON LEWIS,
*Solicitor for Appellees.*

STRATTON, LEWIS & GILMAN AND
FREDERICK BAUSMAN,
*Of Counsel.*